IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1902.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Petitioner and Plaintiff in Error,

vs.

SALLIE E. HILLMON,
Respondent and Defendant in Error.

Term No. 94.

PETITION FOR REHEARING.

To the Supreme Court of the United States and the Honorable the Justices thereof:

And now comes said Sallie E. Hillmon, respondent and defendant in error herein, and petitions said Supreme Court and the Justices thereof for a rehearing of this the above entitled case, and for orders and judgments of said Court to set aside and vacate the judgment heretofore, and at this said October term of that Court rendered in this said case and also to affirm the several orders and judgments of the Circuit Court of Appeals, and also of the Circuit Court of the United States for the District of Kansas, reversed by the aforesaid judgment of this said Supreme Court for the following reasons, namely:

We contend this Court ought not to reverse the judgments of the Circuit Court of Appeals, or of the trial Court for any of the reasons assigned therefor, in the opinion heretofore filed in this case.

In relation to the matter of the written statement dated of the 4th day of September, 1879, we contend the facts in relation to the production in the trial Court, and proving the *contents* of said written statement are as follows, to-wit: That the same was not shown to the witness John H. Brown, when his deposition was taken (r. 339 to 520), and that it, said written statement *was not* at the trial *produced* in, or shown to the trial Court, or its *contents* proven at the trial, either by *any part* of the deposition of John H. Brown read in evidence or otherwise at all, until the same was, as shown at r. 1283 by plaintiff in error, by Mr. Green, one of the attorneys for the Insurance Company, produced in open court and handed to Mr. Atwood, one of the attorneys of defendant in error, who was at the time cross-examining Mr. William J. Buchan, and then offered in evidence and read from a copy certified to by said Buchan and Green as shown at r. 1283–6.

That the record does not show that the *contents* of said written statement, or any part thereof, *had been proven* before it was offered and read as shown at r. 1283–6, or that any part of the deposition of John H. Brown descriptive of such *contents* was read before then — but that on the contrary that the record shows those *contents* had not, or any part thereof before then, been shown or proven to the jury by any testimony, and that such descriptive part of said deposition had not before then been read, given or received in evidence at the trial, is made clear and certain by the record, particularly by reference to r. 339, 340, and to questions and answers in said deposition numbered on those pages 339 and 340 of the record, and examination of that deposition and examination of assignments of error numbers 22 to 26, r. 1936 to 1943, 339, 340.

That the objections to certain of those questions and answers shown at r. 339, 340, said written statement not having been produced and shown to the witness, Brown, when his deposition was being taken, were properly provisionally

sustained, is shown at pages 96 to 99 of the brief and argument for defendant in error heretofore filed in this case, (and in this connection we also refer to pages 156 to 160 of said brief as though here repeated).

The parts of Brown's deposition consisting of questions and answers 406 to 409, 630, 777, 1059, 1060, 1068–9, 1112 to 1146, 1175, 1176, 1184–5–6, 1294 to 1299, 1332, 1346 to 1350, and 130, set forth at r. 383, 404–5, 418, 436–7, 441 to 450, 452–3, 472–3–4, 477–8, and 519, do not show what the *contents* of the written statements actually were, but those questions and answers would not have answered or filled the office they did (argued at pages 143 and elsewhere in the brief) if said written statement had not been offered and read as shown at r. 1283–6. Therefore any argument that the said written statement and its contents, or any parts thereof, were *false*, would if it had not been so offered and read in evidence, of no force or effect—and until it was read as shown at r. 1284, etc., the jury did not know its *contents*, it might for all the evidence had before then shown, been a very different document than what it was. But, and further, even if we are wrong in claiming such *contents* had not been proven before said written statement was offered and read, as shown at r. 1283–6, and if said opinion is correct in that respect, then so offering and reading the same was in substance and effect a mere re-reading and showing of what plaintiff in error had already proven, and surely *so doing*, should not subject defendant in error to the penalty asked by the refused 44th instruction by plaintiff in error and inflicted by this Court on her, and it was necessary and proper as part of the cross-examination of Buchan to read said written statement to show what sort of a paper, as paid employee of plaintiff in error, r. 1247–8, 1262 and 1288, etc., *he took pen, ink* and *paper* with him to write the same with when he went with the officer, Ward, to get that written statement, see r. 1269, and other evidence on that subject referred to in the brief, and which written statement he testified he wrote himself, in his own language, r. 1236–7, 1261, 1269, 1270, but as to whether he or Brown furnished the ideas therein expressed is matter of dispute, between Buchan on one side and Reuben and John

H. Brown on the other, as shown by the conflicting evidence herein referred to—and penalty being inflicted by holding that it was error in the trial Court to refuse said 44th instruction, is in effect a penalty inflicted for trying to prove her third cause of reply to be true.

And further, we request attention of the Court to the parts of our brief in relation to said release and written statement and to said reply. And we contend that a decision to the effect that the Court erred in refusing to give that instruction among other things in effect inflicts a penalty on defendant in error *for trying to prove her third cause of reply*,—the part of that cause of reply in relation to said written statement could not be proven by competent evidence without showing what the *contents* of that written statement was, a description in part of which and her belief of the claimed effect of which on the matter of proving her case against the plaintiff in error Brown and Buchan made her believe as shown at r. 770, 771, etc., helped when she came into the sick condition mentioned in said brief at page 113, etc., thereof to cause her to sign the release as shown at r. 771–2–3, 822–3, 830–1, 1241, 1243.

And further, even if defendant in error had, when said written statement was read, as shown at r. 1283–6, stated it was read for any particular purpose *then specified* that she *could not* by so doing, have changed or lessened any otherwise legal effect of so doing, is shown by the case of—

Sill v. Reese, 47 California, 294, 340.

And it is a well settled rule that it is for the Court to determine the legal effect of legal instruments read in evidence, which is of course to be dependent on the nature of the issues in the case, as shown by the legal maxims referred to in said brief at page 162, etc., and cases in relation to libel, forged and other instruments obtained by either forgery, fraud or other undue means,—and said written statement was —in and by said reply alleged to have been wrongfully and fraudulently procured as therein alleged for the wrongful purpose therein alleged.

And further, we submit that by said reply the most FORMAL NOTICE was given, to both plaintiff in error and to the Court, that said written instrument *would be proven* for the purpose of sustaining that cause of reply, and it *could not* be proven by competent evidence *without* reading it in evidence, nor could its *contents* be otherwise lawfully shown, and surely *plaintiff in error could not, by anything it ever did or could do* either at the trial or by cross-examination of Brown *take from* or *deprive* defendant in error of her *lawful right to prove that third cause of reply by competent evidence, or compel her to abandon that cause of reply under penalty of said written statement being taken as true, or competent affirmative evidence against her* that its *contents were true*, because of its being so read in evidence.

And further, referring to the words *under oath* in said opinion as well as in said refused instruction, we refer to what is said on that subject in said brief at pages 164 to 166 thereof, and we contend *it was not under oath* within the meaning of that instruction, nor as those words would have been understood by the jury if that instruction had been given.

And further, it was not *under oath* with *like effect* as the deposition, and on that matter we refer to what is said in said brief at pages 138–9 and 164 to 168 thereof. And we contend that the words *under oath* in said refused instruction *ought not to be disregarded*, and that said written statement was not *under oath* in any legal sense or in any such sense as the jury would have understood the same if that instruction had been given. AND PLAINTIFF IN ERROR HAVING *those words therein we contend the* MEANING THEREOF *may not be ignored or taken away now at its request.*

And we contend that one of the clear and certain meanings of that instruction is that the written statement was *under oath with like effect* as the deposition, and we submit it is clear and certain it was not so *under oath.* False swearing in the deposition would have been perjury, but not so as to the written statement, as Buchan convinced Brown, as shown at r. 473, A. 1295, and 457, A. 1224.

And in relation to the words, "*it was competent for the defendant to waive this objection* and to treat it as other testimony

in the case offered by the plaintiff," even if the idea expressed by those words would in any imaginable case have become appropriate, we submit they are not as to any application to said refused instruction, because it by said instruction *asked the court to say to the jury* to the effect that the written statement was *under oath*, not merely that it was *under a void pretended oath* but *under oath* with like effect as the deposition, which it surely was not. Plaintiff in error could not so waive as to itself, and also so use or have used by the Court those words *under oath* as to or against defendant in error.

The matter of plaintiff in error having by its agents procured that written statement was important in the case, and it, and the manner in which it and said release when coupled with the testimony of John H. Brown, Reuben Brown, James W. Green, William J. Buchan and defendant in error referred to in the brief for defendant in error in relation to the matter of that release, and said written statement, was important to show both the want of consideration for and how the release was obtained. (See particularly record 770, 771, etc.) And for some purposes reading of that written statement to the jury *when read* was proper to show that Buchan, a lawyer, who would write such a paper and use it as he testified he did, was not a credible witness, too bad a man to believe, as well as for other purposes urged in said brief.

By procuring that written statement of Brown in the manner and by the means shown by the evidence referred to in said brief, and in paying Buchan for obtaining the same as well as the release, as shown at r. 1247–8, 1262, 1288, etc., as shown by its own witness, (Buchan stated as shown at r. 1247–8 in answer to questions asked by its own attorneys on his examination in chief as its witness), plaintiff in error became responsible for that written statement as much as though it had been a living person and wrote and signed the name of Brown thereto itself, and thereby that written statement became the act and deed of plaintiff in error as between it and defendant in error. *Yet that part of the matter is ignored in the second subdivision of the opinion of this Court in*

this case as well as in the 44th instruction set forth in the 105th assignment of error; and that part of the matter was reason sufficient independent of any other for refusing the instruction.

But, and if plaintiff in error was entitled to that refused instruction as written, then the evidence referred to in said brief, to the effect that plaintiff in error (and the other Insurance Companies) procured the same in the manner and by the use of the means shown and for the purpose of suppressing and destroying testimony favorable to defendant in error, including destroying the character of Brown, and to help to obtain the release or surrender of the policies as the fact of its existence was used *is all ignored,* and the rule established that an insurance company can employ and pay agents to do all that Buchan did, as shown by the testimony of John H. Brown, Reuben Brown, James W. Green and defendant in error, and still have benefits from such wrongful acts as against the party thus injured if and because of its wrongful acts done by its employed and paid agents are proven as alleged against it. And we ask your Honors to reconsider the matter and decide to the effect so to do or to have given that instruction would on the part of the trial Court have been the acme of injustice.

And on that matter we submit that to rule that said instruction as worded should have been given to the jury includes a ruling to the effect that plaintiff in error was entitled as matter of law to have all of the testimony of Reuben Brown, and so much of the testimony of John H. Brown as related to the manner and means by which said written statement was procured *utterly ignored* and *treated as false by the Court.* We contend such is not the law.

And further in this connection, and with special reference to the matter of that part of the opinion of the Court which is in relation to the testimony of Buchan, we contend that *because of the rules of law in relation to conflicting evidence* on any matter to the effect that the Court *may not lawfully disregard conflicting testimony,* and instruct the jury on matter of law as though only such of the conflicting evidence as is favorable

for one party is true, or the only testimony on the subject, as the Court would have done if it had given that refused instruction to the jury, *because* both Reuben Brown, as shown at r. 545 to 575, and John H. Brown, as shown by the copied part of his deposition, set forth in said brief at pages 40 to 44 thereof, and elsewhere, as shown by his deposition, testified to the contrary of the so referred to testimony of Buchan, so far as the same is material to any question involved—and further *prima facie* by the referred to testimony of Reuben and John H. Brown, and the admission or statement of Buchan as a witness, as shown at r. 1227, to the effect that he wrote for Reuben, as Reuben testified, as shown at r. 545–6–8, which was after Walker, an employee of the Insurance Company, r. 1066–7, went to see the father of Brown, r. 1167, and with the father went to Buchan, as shown at r. 1250, when Buchan commenced to act in behalf, and in the interest of, the Insurance Company, and continued so to do until he had procured said written statement and the release, as shown by the testimony referred to at pages 28, 29, 30, 31, 32, 35 to 44, 48 to 52, 146, 147 and 148 of said brief, plaintiff in error is shown to have, with its associates and its and their agents, commenced the matter of procuring such written statement, and of making itself responsible therefor as its act and deed.

And by the referred to testimony it was *prima facie* shown that plaintiff in error, by its agents, wrongfully procured and caused said written statement to be made, and that the so referred to in said opinion, part of the testimony of Buchan was so far as material to any question involved utterly false. Yet if said refused instruction had been given *such referred to testimony conflicting with that of Buchan would have been disregarded and utterly ignored*, while if Buchan's referred to testimony was false one and a necessary reason to sustain any claim to the effect that said refused instruction should have been given, would fail, and as the trial Court ought not to have disregarded such conflicting testimony, of course we contend the judgment ought not to be reversed because it did not. If said instruction had had a clause therein practically to the effect that if the jury believed Buchan and dis-

believed the two Browns, the question and case as to this conflicting evidence point would be different than it now is, with the instruction worded as it is (and if Buchan did not get said written statement for the purpose in said reply alleged, why did he tear and throw it into a stove, used as waste basket, when he had gotten the release, as shown r. 1246, 1276, 502, 520, 457–8),—and we submit that if the reversal is to stand, it follows that so far as the matter of that written statement is cause of reversal that it follows that the plaintiff in error obtains its victory among other things because as matter of law its witness, Buchan, is to be believed as against the conflicting evidence referred to, and we contend such is not the law as applicable to the matter and question involved, and that if defendant in error proved the part of her third cause of reply in relation to the written statement to be true that therefore the statement should be considered as true, at least as competent evidence against her,—*surely such is not the law.*

And further, we contend that defendant in error, because of the issues, had right to help her defeat the release (r. 19) to have introduced the written statement in evidence at any time during the trial to help sustain her third cause of reply as well as with help thereof to help sustain her second cause of reply (we here refer to pages 156 to 160 of said brief as though here repeated).

IN RELATION TO THE MATTER OF CONSPIRACY.

1st. We have hitherto supposed that we and defendant in error had always denied that any competent (or even incompetent, other than the Brown statement, wrongfully obtained by plaintiff in error and others, as shown by evidence referred to in said brief, and said written statement was not competent against either Hillmon, for reasons stated in said brief, at pages 161, 162 thereof, and elsewhere therein) evidence had been introduced of any conspiracy to which John W. Hillmon was a party, or that he was a party to any con-

spiracy whatever, or that he ever did, or committed any wrongful or illegal act, or any lawful act in a wrongful or illegal manner; and we and defendant in error contend that it cannot be demonstrated that it would have been necessary to do or say more than as done in said brief to prevent being held by this Court or represented in or by its opinion in the case, as having failed to deny that considerable or any evidence had been introduced of or as tending to show Hillmon was a party to, or the existence of, a conspiracy between the three — John W. Hillmon, Brown and Baldwin; and we contend that contrary to the showing and denials on behalf of defendant in error, great wrong is done her and her cause by the statements in that respect in the opinion; and we contend *the claim* that there was competent, or any evidence (said Brown statement not being such against defendant in error), showing the alleged conspiracy as against John W. Hillmon or defendant in error, is not sustained by evidence sufficient to sustain such claim, as to such denials, see pages 19, 20, 21, 216–17, 211, 230 to 234 of said brief.

And we contend that a reading of the record and of our brief will show there is nothing to sustain any claim we have not always denied there *was any competent evidence against John W. Hillmon of any conspiracy, or that he was ever a party to any conspiracy*, and if our claim is correct that the Brown statement was not affirmative evidence, competent against defendant in error or John W. Hillmon to prove existence of conspiracy, *then we contend that all of the evidence*, competent and incompetent combined, in the case, or any part thereof, is not sufficient to sustain any claim John W. Hillmon was ever party to any conspiracy, or was ever party to or committed, or did either any illegal act or any lawful act in an illegal manner, see particularly the part of said brief in italics on page 233 thereof.

2nd. We contend that for reasons stated in said brief the excluded evidence was not competent in the case.

John W. Hillmon did not, nor does defendant in error claim, under or through Levi Baldwin, and Levi Baldwin was not a party to the suit.

In the case of—

The State v. Johnson, 40 Kansas, 266, 267, etc.,

the following language is used in the opinion of the Supreme Court of Kansas, at said page 267, to-wit:

"He claimed also to have had conversations with Kreinhop and Johnson on the same day, and the statement of each detailing his connection with the crime was testified to by the witness. The admissions and declarations so admitted were made by each defendant in the absence of the others, and were allowed to go to the jury over the objections of the defendants not making the admissions as though they were applicable to all. These admissions were competent testimony against the defendant making them, but certainly they were not against the others. While the existence of a conspiracy to commit a crime may be shown by the confessions of the *several* individuals engaged in it, it is well settled that one person cannot be convicted of a conspiracy by the declarations of another,"—and all the transactions between the parties relating to the controversy were in Kansas; and we contend that because of Sec. 914, R. S. 1878, as well as on general principles, that part of said Kansas Supreme Court opinion is conclusive that the excluded statements of Levi Baldwin were not competent evidence to prove any alleged conspiracy as against defendant in error either because of anything done by John W. Hillmon or of anything he did in or about procuring the policy sued on, or otherwise.

3rd. And we contend that the well settled law on such subjects is to the effect that said excluded testimony was not competent to prove the existence of any conspiracy, Baldwin not being a party to the suit.

4th. And that any statement Baldwin could have made in the absence of both defendant in error and John W. Hillmon to any person, would not be competent evidence in the case to prove the existence of any alleged conspiracy, Baldwin not being party to the suit.

5th. And further, those excluded statements of Baldwin were not "in furtherance of the object of any alleged conspiracy," and therefore the same were properly excluded,

irrespective of any other reason. Only such statements of any co-conspirator are in any case, under any circumstances, admissible as are made *in furtherance* of the object of the alleged conspiracy; it is not *every* statement of even a proven co-conspirator that is admissible against even a proven to-be co-conspirator, *but only such as are in furtherance of the alleged common object;* and we contend that even imagination cannot show *how*, or in *what manner*, the *excluded* evidence or statements of Baldwin was in furtherance of any alleged common object or design, and therefore the same were not admissible.

Logan v. U. S., 144 U. S. 309.
The State v. Johnson, 40 Kansas, 268.
107 Fed. 839.
1 Greenleaf on Ev., Sec. 111.

This as to each of those statements respectively, and from those last cited authorities, particularly 1 G. on Ev. Sec. 111, it appears care must be taken that the admitted be such only as are in furtherance of the objects of the alleged conspiracy, the statements of Baldwin respectively were not *res gestae* of any act carrying out any object or common design, and we contend the opinion of this Court as published confounds this matter and disregards such distinction, and in effect holds that Baldwin's statements might be admitted to prove that John W. Hillmon was a party to the alleged conspiracy, and the existence thereof as against both Hillmons, whilst the law we contend as shown by said 40th Kansas, 267–8 and other authorities is to the contrary.

And further, in reference to the denial of there being any competent evidence as against defendant in error as standing in place of John W. Hillmon that he was party to any conspiracy, *we contend he is not shown to have done any act that tended to show such conspiracy as alleged*, (this treating the Brown statement as not being so competent).

Among the reasons why the excluded testimony was not competent and was properly excluded, is that there is not any competent evidence that any *wrongful* or *unlawful act* was done, or any lawful act done in an unlawful manner, *there is not any ground for pretense* that any wrongful act was

done if the dead body produced was the corpse of John W. Hillmon, *and the jury found to the effect that it was his dead body*, as to which matter we refer to pages 197 to 200 of said brief, and the authorities there cited. And as shown by the authorities cited in said brief at pages 185 to 234, particularly at pages 189 to 195 thereof, the only evidence that could have lawfully been introduced to support the second defense (r. 18) was as to whether said dead body was that of Hillmon or not.

And that question was duly submitted to the jury (r. 1917–8–9, 1921, to determine whether it, said body, was the corpse of Hillmon, in substance as requested by plaintiff in error as shown by the first and twenty-eighth instructions asked (r. 1904, 1909, 1996, 2003), in pursuance of its theory and construction of the issues in the case shown by asking those instructions, and the jury found to the effect that said corpse was the dead body of Hillmon, as to which matter we refer to pages 197 to 201 of said brief.

6th. And if this Court is right and sustained by evidence in the case, in and as to that part of the first paragraph in the third main subdivision of its opinion heretofore delivered herein which is as follows, "AFTER EVIDENCE HAD BEEN INTRODUCED ESTABLISHING SUCH CONSPIRACY," then we contend it follows clearly and certainly as day and light follows the darkness of any night, that by asking those instructions plaintiff in error *eliminated* from the case and *waived consideration* by the jury of any question, material or relevant to consider relating to any alleged or claimed conspiracy, as claimed in said brief at said pages 197 to 201, and having so *eliminated* and *waived* any such question (if before then such question was in the case) the authorities cited at page 199 of said brief show *it is not entitled* to be *heard* thereon in this or in any court of review, or on, as to, or *in relation to any question conflicting* with the fact that the *real question* in the case was as to whether said corpse was the dead body of Hillmon or not, this because if the Court is right as to the said quoted part of its opinion there was established by evidence a question of conspiracy in the case, (even if we are wrong in

our claim urged at pages 188 to 196 and 207 to 217 of said brief and elsewhere therein to the effect that the second defense pleaded (r. 18) in substance and effect only raised an issuable question as to whether said dead body was the corpse of Hillmon or not), *and if the fact is as so stated* in the opinion, then plaintiff in error by asking said 1st and 28th instructions waived consideration thereof by the jury, and having so done we contend that ended the conspiracy matter, and if that quoted part of the opinion is wrong then it follows that it was proper to reject the excluded evidence, because as elsewhere herein shown an alleged conspiracy could not be proven against John W. Hillmon (or defendant in error) by statements or acts of Baldwin in the absence of each, and therefore the judgments ought not to be reversed because of rejection of the excluded testimony.

7th. And if we are right in claiming as we do that there was not evidence in the case sufficient to establish any alleged conspiracy as against John W. Hillmon, or that he was party to any alleged conspiracy, in view of the authorities cited, including 40 Kansas 267–8, it therefore, irrespective of any other reason or cause of rejection of such excluded testimony, follows equally clearly and certainly that the excluded evidence mentioned in the opinion, exclusion of which is stated therein as cause for reversal of the judgments, was not competent or admissible against defendant in error, or to show or prove anything as against John W. Hillmon, or the existence of any alleged conspiracy or that he was party to any such alleged conspiracy, Baldwin not being party to the case.

And further that agency cannot be proven by declarations of the claimed agent, see—

Donaldson v. Everhart, 50 Kansas, 718, 724.
Railway Co. v. Kinman, 49 Kansas, 631.
1 Greenleaf on Ev. Sec. 112, note (*b*).

And the law in relation to admission of statements of an alleged co-conspirator under any circumstances is based on the law of agency or a rule of same import.

8th. And further, as John W. Hillmon is not shown by the evidence to have done any unlawful act, or any lawful

act in an unlawful manner, we contend that the whole conspiracy question is immaterial. This is shown by the case of

Porter v. Mack, 50 W. Va. 581; s. c. 40 S. E. 459, 463, and cases there cited,

and the authorities referred to on pages 195, 189 to 193 of said brief, certainly because thereof, that is, of the want of any such evidence, the excluded testimony was not admissible in evidence.

9th. As plaintiff in error could not have been injured by any alleged conspiracy if the said dead body was the corpse of Hillmon, and as the only issuable allegations in said second defense were as shown by the authorities last above referred to to the effect that said dead body was not that of Hillmon, but that he was still alive (and that question was in the manner shown by the record duly submitted to the jury, which found to the effect that it was the corpse of Hillmon), it follows that the said excluded testimony could not have had any effect or performed any office or part other or further than to help (even if it would have so done) to prove by and because of what Baldwin had said and done, that Hillmon was party to the alleged conspiracy, and we see from authorities before referred to that the excluded evidence was not competent for such purpose.

And further, as those referred to authorities establish the law incontrovertibly to be as claimed by us at pages 189 to 201, to the effect, as applicable to this case, that the allegations about conspiracy were immaterial. Baldwin not being a party to the case, the same were not required to hold him to any liability, and in the nature of the case it not being material what statements he had made or acts he had done in the absence of said Hillmon, or what his condition was, it follows that the excluded evidence, if admitted, could not have had lawful effect on any material issue in the case, and could not have had effect other than to help plaintiff in error to try the issues on the incompetent and hearsay statements of Levi Baldwin. And we contend that it is not according to law to hold that it could do so, whether the Court of Appeals or trial Court, either of them, *either erroneously or*

otherwise at all, did or did not consider or hold the evidence in the case sufficient to establish a conspiracy as against John W. Hillmon. But if those courts so held, *we contend they respectively erred in so doing*, and we contend that it is not according to law for this Court to act on the basis those courts so held, but it would be for this Court to determine such question for itself (if the jury had not substantially so found under such instructions as given to the contrary, irrespective of anything said by either of those courts) *from the evidence* if and so far as this Court holds any conspiracy question material. And if this Court reverses the judgments of those courts because of the rejection of the excluded testimony, then if this Court is correct as to the before quoted part of its opinion, we contend it will so reverse those judgments *merely because cumulative testimony*, claimed by plaintiff in error to be of such nature as to help establish the alleged conspiracy was not admitted to further establish such alleged conspiracy as against Hillmon by the statements and acts of Baldwin in his absence (incompetent we claim as before for reasons stated), notwithstanding plaintiff in error, by asking its 1st and 28th instructions, abandoned and eliminated the conspiracy question from the case, and also this in a case where, as we contend, the conspiracy question always was and is immaterial, and in this case where the only office and effect the allegations about conspiracy could perform, if proven, would be to show that Brown and Baldwin were equally responsible with Hillmon, if Hillmon really was party to the alleged conspiracy, and this is a case to which neither Brown or Baldwin was party, and this also in a case in which plaintiff in error was not injured if the dead body mentioned was as in effect found by the jury to be the corpse of Hillmon; and this also in a case in which the alleged conspiracy could not in any event have harmed plaintiff in error, because recovery could not be had on the policy unless the dead body was the corpse of Hillmon.

10th. And irrespective of anything before urged we contend it was not competent for plaintiff in error to prove by statements or acts of Baldwin with what intent Hillmon did, what he did, whatever that was, in or about procuring

the policy sued on, said policy being a lawful contract, and therefore that it was not error to refuse the excluded testimony.

11th. That because the second defense did not allege any injury to plaintiff in error resulting because of the alleged conspiracy, and it could not have so alleged without alleging Hillmon came to his death in pursuance of the conspiracy, the whole alleged conspiracy was immaterial, and evidence could not lawfully be admitted to prove any allegation in the second defense other than evidence as to whether the dead body was the corpse of Hillmon or not, (a mere matter of identity,) is shown by the cases decided by this Court, the Kansas Supreme Court and other Courts, referred to at pages 189 to 196 of said brief, and therefore the refused evidence was properly excluded. That it would not be of any use to prove Hillmon conspired unless plaintiff in error was injured in pursuance of such conspiracy has in effect, we contend, been by the authorities referred to established by this and other Courts too firmly to admit of question, and plaintiff in error did not dare to allege in its answer Hillmon so came to his death, (because of resulting consequences if it had, as shown at pages 202 to 207 of said brief,) but wants to try the case on incompetent, hearsay and immaterial statements of Baldwin as shown by those authorities, and we contend it ought not to be upheld in such effort.

12th. And we contend that the part of said opinion of this Court in relation to the matter of alleged conspiracy is in conflict with the decision of this Court and other Courts referred to at pages 189 to 217 of said brief, particularly those cited at pages 189 to 196 and 199 thereof, because those authorities establish the proposition *that allegations of conspiracy without allegations of resulting damages accruing because of consummation of the conspiracy are immaterial, and do not admit of proof*, and that as applicable to this case, and said second defense, proof or evidence should be *limited to testimony* as to whether said dead body was the corpse of Hillmon or not (a question fully tried and duly submitted to the jury as requested by plaintiff in error, and by the jury in effect by its

verdict found that it was his corpse) that question being the only *issuable matter* alleged or presented by that second defense, Baldwin and Brown *not either being party to the case* it was not material or proper to permit evidence of any *alleged conspiracy* to be introduced because the only office or use of allegations of conspiracy in any case in a civil action between parties is to lay *foundations to hold parties liable* for wrongful acts done because of which *actual injury* is by alleged *issuable facts* shown to have been sustained because of carrying out the alleged conspiracy, who but for the alleged conspiracy would not have been liable. That is, to hold parties who did not commit the wrongful acts *otherwise than by those who by and because of the conspiracy became their agents* And even in such cases the only statements of the alleged co-conspirators admissible is such as done *in furtherance* of and at time of doing those things done to carry out the conspiracy, *admissible only as a string or means to hold* and recover against *some parties who but* for the conspiracy *would not* be liable on, or because of the *special* issuable alleged facts because of which *alleged damage* was sustained, (see same brief pages 189 to 196, particularly 194) and *never admissible to establish* the conspiracy as against one (John W. Hillmon) who did not make the statements to establish the alleged conspiracy as against him. And as defendant in error could not recover unless said dead body was the corpse of Hillmon, and as Brown and Baldwin were not either a party to the suit, it follows that the excluded evidence was incompetent, irrelevant and immaterial and was properly excluded.

And that proof of a conspiracy in this case could not have been made material without a defense alleging that in pursuance thereof Hillmon came to his death.

13th. And further, even if we are wrong as to all other claims in relation to the alleged conspiracy, plaintiff in error cannot properly ask to have a policy held void *ab-initio* because it did not return the premium it received, it was paid for the policy sued on, r. 145, 151–2–3, 752, 1496, 1524, (and see herein brief of plaintiff in error, pages 48, 145, 148–9 thereof, conceding premium was received to a time beyond that of the

claimed death of Hillmon). And that it is a settled rule of law and equity that a party cannot set aside or avoid a contract because of fraud without first returning all by it received thereunder, is shown by the case of—

Jeffers vs. Forbes, 28 Kansas, 174, 181, and cases there cited.

And the clause in *italics* referred to at bottom of page 92 of the brief of plaintiff in error does not help plaintiff in eror on this matter, because if the contract between the parties *is void* or can be shown to have been void *ab-initio*, that clause goes with the remainder and *all other parts* of the contract, and *that* a contract *cannot* for such as by plaintiff in error claimed fraud be set aside *in part* and *remain in force as to another*, to-wit: as to a clause which would if remaining in force permit it to *retain* or neglect to return the *premium* before attempting to set aside or have cancelled the contract, the policy, is we contend, too well settled to need reference to authorities. And therefore, irrespective of any question as to the matter of construction of said second defense, we contend any request of plaintiff in error for a ruling direct or indirect that will permit it to try to avoid the policy because of any pretended conspiracy or fraud should be overruled. That a court *may not help* a party to do *indirectly* that which cannot be done *directly* is too well established and plain to need to be sustained by citation of authorities. And this matter of the non-return of the premium before filing of said second defense is very different from what it would be if plaintiff in error *had alleged* and *proven* Hillmon *came to his death in pursuance of a conspiracy to the effect he should so come to his death*, and is very different from cases where recovery is defeated for breach of warranty, false representation or other similar cause, and such cases are not in point as to the matter of this case, that is, of the effort of plaintiff in error to have its second defense changed by construction so as to let it defeat a recovery because of the claimed conspiracy whether said dead body was the corpse of Hillmon or not.

14th. And we contend that there is nothing shown by evidence in the record (unless by the incompetent written

statement) in relation to the transactions between Baldwin and John W. Hillmon competent against defendant in error that in any manner tends to prove conspiracy, or that John W. Hillmon was party to any conspiracy. Those transactions were only such as is usual between parties located and situated as they respectively were, and to claim any of those transactions are evidence of a conspiracy we contend is equivalent to saying *that the ordinary transactions* between people may be construed to establish a conspiracy *if an enemy chooses so to allege.* And we contend there is not sufficient evidence to sustain a claim that Hillmon was a man of no property, and Hillmon and his wife living for a short time as they did, is no evidence of a want of property. It was not permanent nor intended to be a permanent way of living. Hillmon died while on such expedition as shown by testimony referred to at page 139 of the brief of defendant in error. And it would have been contrary to custom for people similarly situated, recently married, intending to go into ranching business, to have gone to housekeeping or living in the manner wealthy city people sometimes do, or that plaintiff in error claims and the Court *seems by its opinion to hold* they should have done if Hillmon was not in a conspiracy.

Plaintiff in error presumably knew, at least should have known, when it insured Hillmon, who and what he was. There is nothing shown by evidence it did not, and when it was taking the premium paid it, Hillmon was good enough man to insure the last $5,000.00 of $25,000.00 under the circumstances referred to at pages 20, 21, 210, 231–2, of the brief (and argument) herein of defendant in error, on his life as it knew after months of negotiation it was doing, as shown by the amounts of previous insurance stated in the application shown at r. 180 on which the policy sued on was issued, and we contend that the rules of law and equity should be held to estop plaintiff in error from making any objection, or having for its benefit referred to, any matter it either knew or could with diligence have ascertained in relation to, in the absence of both allegation and proof, that it was by affirmative action prevented from so doing, and there is nothing in the evidence giving it any excuse for claiming

it was prevented from ascertaining the antecedents and situation of Hillmon when it contracted as shown by the policy, and we contend that as Hillmon and wife were good enough to take premium from at that time, the contract ought now to be complied with on its part and that any objection urged in behalf of plaintiff in error against Hillmon or his financial condition whether he was poor or well-to-do is inequitable, and contrary to law and the principles of justice, particularly if said dead body was (as is practically by the verdict found to be) the corpse of Hillmon.

And we contend that every act and remark of John W. Hillmon, as well as of Levi Baldwin, done or said in the presence of Hillmon was and is under the circumstances shown by the evidence, referred to at pages 20, 21, 210, 231 and 232 of said brief of defendant in error, not only *consistent* with the fact of his *not being party* to any conspiracy but is also *inconsistent* with the claim he was party to any conspiracy, and that there was not admitted sufficient evidence *to establish any claim* that he was party to any conspiracy, and that under the issues the rejected testimony can be of no force or effect (if of any at all) further than possibly because of statements of Baldwin to cause some juryman to think *possibly* Baldwin conspired, but without that excluded evidence we contend the alleged conspiracy was not and cannot be established sufficiently for any purpose whatever, even if it can be with it. And Baldwin's statements were not admissible to establish conspiracy against Hillmon. And we contend plaintiff in error requires that the written statement of the 4th of September, 1879, procured and written by plaintiff in error and others by its and their agent Buchan by the means and methods shown by the evidence in the case to be considered affirmative evidence against the defendant in error of the alleged conspiracy and also the excluded statements, etc., of Baldwin to establish a case of conspiracy as against Hillmon, and *then* it would *only be of an immaterial conspiracy if said dead body* was the *corpse* of Hillmon, as the jury by their verdict in effect found it was in pursuance of instructions given by the Court on that subject *on the theory* shown and claimed by plaintiff in error by asking its 1st and 28th requested instruc-

tions so worded that by asking them to be given to the jury it *eliminated* from the case and *abandoned any claim of conspiracy* even if evidence received established the existence of a conspiracy as against Hillmon.

And as an unobjectionable jury so found—*unobjectionable* because as shown at r. 136, 137, *after all of the twelve men who composed the jury that so found were in the jury box* plaintiff in error *waived* its right to peremptorily challenge either of them whilst it might have peremptorily challenged either of them if it had seen fit or had any objection to either of those men, jurors, and that jury being such as mentioned in the opinion of this Court in the case of

Railroad Company v. Stout, 17 Wallace, 664,

were as there shown more likely to pass and *determine correctly on the facts than any court*, at any rate the jury were the triers of the facts in the case, and they so found as before stated, and to the effect that said dead body was the corpse of Hillmon, under instructions r. 1917–18, 1919, 1921, *given in accordance with the theory and construction* of the issues accepted by plaintiff in error by asking said 1st and 28th instructions asked by it, r. 1904, 1909, 1996, 2003 as heretofore argued, as shown at pages 197 to 207 of the brief of defendant in error, and if on reconsideration this Court shall hold that the trial Court did not err by refusing to give the 44th instruction *either because* the parts of the deposition of Brown descriptive of the written instrument dated of the 4th of September, 1879, were not as shown at r. 339, 340 read to the jury, at any rate not before the said written statement was read as shown at r. 1283–6 *or because plaintiff in error could not after having procured such written instrument to be made* by the means and methods and as shown by the evidence heretofore and in said brief referred to, *prevent defendant in error from proving it so did as alleged in her reply* (r. 21, 22,) *without making it competent affirmative evidence* AGAINST HERSELF that the STATEMENTS THEREIN were true, that much of the conspiracy matter will be eliminated from the case.

And the evidence of Buchan set forth at r. 1247–8, 1262, 1269 and 1288 about his employment, payment for his services, taking pen, ink and paper with him to write the same

under the circumstances shown by the evidence referred to in the stating part of said brief, and in the part thereof in relation to assignment of error No. 105 (concerning said 44th instruction), we contend conclusively establishes our claim that plaintiff in error as between it and defendant in error is responsible to her as maker of that written instrument, if not then when his testimony is considered in connection with that of Reuben and John H. Brown, defendant in error and James W. Green, and with Buchan's evidence in relation to the tearing of that written instrument and his remarks made at the time set forth at r. 1246 *it is conclusively* shown that plaintiff in error by Buchan, its pa. agent, procured that written instrument for the purposes in said reply alleged, and we contend it would have been competent and proper for defendant in error to have read that written statement in evidence at any stage of the case to help prove her said reply to be true without becoming liable to the penalty of making that written statement affirmative evidence against her of truth of anything therein stated, either within or according to the tenor or meaning of that rejected 44th instruction, and if we are wrong in that, then plaintiff in error has advantage of its own wrongful acts done by its agent.

And in this connection with reference to some of the excluded statements of Baldwin we refer to Hillmon's applications for insurance wherein as shown at r. 167, 171, 174, 180 and 186, he informed the insurance companies to the effect that he was a dealer in live stock, and the same thing is shown at r. 1496 and 1505, and by the fact that he was hunting a location for a stock ranch when he was killed, r. 381, A. 398 to 401, and r. 349, A. 80, and r. 334, A. 33, referred to at pages 11, 139 and 20 of said brief, and the evidence also showed that Baldwin was a stock man, r. 684, 716, 717, and further Hillmon held Baldwin's note and due bill for considerable amounts as shown at r. 1889, on which payments were made as shown at r. 1894–5–6, which were once in the hands of Buchan as shown at r. 1251, 1888, 1889, all of which we contend conclusively shows that it is not proper to use anything said by Baldwin about payments of premium, scheme

or brogue *to help establish a conspiracy as against Hillmon*, this *in addition* to our contention that none of the offered statements of Baldwin were in any manner *in furtherance of any conspiracy*, Baldwin had already gotten much of Hillmon's money as shown by the note and due bill, and we contend the law is that statements may not be construed to mean more than their import or inconsistently with indisputable facts, whilst to construe anything said by Baldwin to help establish a conspiracy against Hillmon or as being in furtherance of any conspiracy is, we contend violent and extreme, and inconsistent with and not warranted by the circumstances of the case, shown by the evidence considered as an entirety, including the evidence and circumstances referred to at pages 231–2 and 19, 20 and 21 of said brief.

15th. And further we contend that a reversal of the judgments because of a rejection of the excluded evidence is erroneous, because that excluded evidence was immaterial if the before mentioned dead body was the corpse of John W. Hillmon; and unless it was his body the defendant in error could not recover, and the trial Court so instructed the jury (r. 1921, 1919, 1917–8), and if it, said dead body, was the corpse of Hillmon, then the case of

Adler v. Fenton, 24 Howard, 407, 410,

and other cases therewith cited in said brief of defendant in error, as well as the other cases referred to at pages 189 to 196 of said brief, we contend, *show conclusively* that plaintiff in error had not a defense *equivalent to a cause of action to cancel the policy sued on because it was not injured by any alleged conspiracy* (whether established by evidence or not) if that dead body was the corpse of Hillmon, and as to *that question those cases* show the allegations about conspiracy were *limited* to *that question*, but whether so limited or not, those cases show that the *alleged conspiracy was immaterial if that dead body was the corpse of Hillmon*, and as we do not suppose the Court in this case means to overrule its former decisions referred to on those pages, or to decide contrary to the decisions of other courts cited on those pages, we contend the part of its opinion in this case in the words following, "While we are not

called upon to express an opinion upon the question whether the mere proof of a conspiracy to defraud the defendant by the procurement of an insurance upon Hillmon's life with the view of ultimately collecting the amount of the policies by a false pretense of his death would be sufficient to avoid the policies as having been obtained by fraud, without proof that such conspiracy had been consummated by compassing the death of another party and passing off the body of the deceased as that of Hillmon," *is contrary to all of those referred to cases*, and if we are right in that respect, we contend it follows that the part of said opinion which is between those quoted words and the last paragraph therein as well as all therein relating to the alleged conspiracy, which precedes those quoted words, *is irrelevant to the case:* of course, if this Court intends to be understood as overruling or deciding contrary to those referred to cases, then this, the foregoing part of this No. 15, is not matter now for consideration; but we contend it is conclusive to the effect that the said judgments ought not to be reversed because of anything in relation to any conspiracy question—CERTAINLY NOT UNLESS PLAINTIFF IN ERROR CAN DEFEAT A RECOVERY on the policy, *even* if said dead body *was the corpse of Hillmon*, and without alleging or proving it *has been injured* by any alleged conspiracy, and can also try to get a jury to believe there was such alleged conspiracy on statements, and proof of financial condition of an outside party (Baldwin) in no way connected with the policy, without proving Hillmon did or helped do any unlawful act, or any lawful act in an unlawful manner. And further, unless it, plaintiff in error, can so defeat recovery, notwithstanding it *eliminated from the case and abandoned* any claim to defeat recovery on the policy because of any *alleged conspiracy by asking* the Court to give the 1st and 28th instructions, as urged at pages 197 to 200 of said brief, nor unless the authorities cited at page 199 of said brief in relation to that matter are overruled or disregarded. Whilst we contend they are conclusive against plaintiff in error and are to the effect it ought not in this Court be heard as to the matter of said alleged conspiracy.

And further we contend that the case of

Smith v. N. B. Soc'y, 123 N. Y. 85,

referred to in said opinion, is not in point against defendant in error, because, as therein shown, the *insured came to his death in pursuance* of the *alleged fraud* and *thus* it was in that case *shown* that the insurance company, defendant in that case, *was injured because of the alleged fraud*, that is, became liable to pay the amount of the insurance unless it could defend because of the *consummation* of the fraud, and in this case all competent evidence as to the identity of the dead body was admitted, whilst said SECOND DEFENSE in this case is *to the effect* that plaintiff in error *was not injured at all* IF THE STATEMENTS THEREIN ARE TRUE, this because it was not injured by *any alleged conspiracy if said dead body was the corpse of Hillmon*, as in effect found by the jury to be,—and (as the Court instructed the jury) defendant in error could not recover if the corpse was not the dead body of Hillmon.

AND IF IT, SAID DEAD BODY, WAS NOT THE CORPSE OF HILLMON, AS SO BY IT ALLEGED, THEN PLAINTIFF IN ERROR WAS NOT INJURED. SO THAT IN EITHER CASE, AND NO MATTER WHOSE CORPSE THAT DEAD BODY WAS, PLAINTIFF IN ERROR WAS NOT INJURED BY ANY ALLEGED CONSPIRACY, AND PLAINTIFF IN ERROR MADE THAT CERTAIN BY ITS ALLEGATIONS IN SAID 2ND DEFENSE,—and thus we see that the real question was actually as to whether said corpse was the dead body of Hillmon, as stated in the said 1st and 28th instructions, and as in effect stated by the Court in its charge to the jury. (In this connection see particularly the hereinafter quoted part of the opinion of this Court, in Adler v. Fenton, 24 Howard, 410, and the cases therewith referred to at page 193 of said brief.) And surely anything said or done by Baldwin could not be made evidence against defendant in error as to whether said dead body was the corpse of Hillmon or not, further or otherwise than as Levi Baldwin who, as a witness, identified the dead body as the corpse of Hillmon (r. 686 to 690). And plaintiff in error, to try to impeach him as to such matter of identification, might have asked him questions relating to the matter of the excluded testimony

if it had seen fit, and if he denied, &c., have called the witnesses Blythe, Crew, Carr and Phillips to testify so far as admissible to what he said, &c. And that, we contend, was the only way, and a sufficient way, for plaintiff in error to have got the excluded testimony before the jury, so far as pertinent for any legitimate purpose whatever, as argued at page 215, 216, etc., of said brief. But it did not choose so to do, but wishes to defeat the contract shown by the policy because of statements, &c., of a stranger to the contract thereby shown,—and we contend it is error to help it do so.

With reference to the last quoted part of said opinion in this case, it should be borne in mind that it is not stated in said 2nd defense that the alleged "conspiracy had been consummated by compassing the death of another party," but only in effect—that the aforesaid dead body was not that of Hillmon—whatever the difference in that respect be between said quoted part of the opinion and said 2nd defense we suppose is not important, so far as any question involved is concerned, we make our contention with reference to the 2nd defense as pleaded, and to the contention of the parties respectively in the trial Court, and on the supposition that this Court in its opinion intended to refer to the matter of the 2nd defense as pleaded, and to the controversy relating thereto.

16th. And we contend that plaintiff in error, by asking the Court to give those 1st and 28th instructions, *asked the Court to adopt*, AND DIRECT THE JURY TO FIND THEIR VERDICT ON, a *theory* (and construction of the issues in the case) *of the case and evidence inconsistent* with BOTH so much of said opinion of this Court as relates to any *conspiracy* question, and also with any claim that the *alleged conspiracy* was material matter for consideration by either the jury or the trial Court, or any court of review; and that, therefore, as the trial Court, by what it said about *conspiracy* in its charge to the jury, adopted and charged according to such theory, that is, as so requested by plaintiff in error; therefore, it, plaintiff in error, should not here be heard to complain of anything said in its charge by the trial Court in *relation to the matter of conspiracy*

or of any ruling of the trial Court in conformity with such theory so claimed by it, and the fact of any such ruling having been made by excluding evidence of statements of Baldwin and of his supposed financial condition before the asking of those instructions, makes no difference *if the evidence previously given established the alleged conspiracy as stated in said opinion*, AND IF IT DID NOT (as we claim), then of course it was proper to so exclude the rejected testimony. And that we are correct as to this claim about the effect of asking those instructions, see—

N. Y. &c., R. R. Co. vs. Estill, 147 U. S. 592 (2nd Syl. on that page and corresponding part of the opinion in that case).

L. N. & S. R. Co. vs. Curtan, 51 Kansas, 432, 438.

Broom's Legal Maxims, 130 (6 Am. Ed. from 4th London Ed.).

And this more particularly, because we contend so to do and rule would be in accordance with the rules of law in relation to allegations of conspiracy shown by the case cited at pages 189 to 195 and 205 of said brief, decided by this Court, and other courts; and we contend the opinion of this Court, as written in this case, so far as the same relates to the matter of conspiracy, not only ignores, but is also in conflict with those cases.

17th. And we contend that the last above quoted part of said opinion *as coupled with what precedes and follows it is practically to the effect* that defendant in error cannot recover on the policy if the alleged conspiracy was entered into EVEN THOUGH THE PLAINTIFF IN ERROR WAS NOT THEREBY INJURED, *and such ruling is*, we contend, contrary not only to the case in 123 N. Y. 85, referred to, but is also in the face of and contrary to the cases in this and other courts last above referred to, inclusive of the said case of Adler *et al.* v. Fenton *et al.*, where at page 410 of 24th Howard it is in the opinion of this Court said: "An act legal in itself, and violating no right, cannot be made actionable on account of the motive which superinduced it." And it was legal for Hillmon and his wife to procure the policy sued on, and there is not any evidence

either ever did an unlawful act or a lawful act in an unlawful manner, and therefore and as is also shown by before referred to cases including that of—

Porter v. Mack, 50 W. Va. 581; (s. c. 40, S. E. 459, 463 and cases therein cited),

the allegations about conspiracy are immaterial, and is not, that is, said quoted part of the opinion in this case is not (we contend) sustained by any heretofore established rule of law, (or shown case decided by any court), *but is contrary to settled rules of law relating to such subject*, and we further contend that deciding *that the excluded evidence should have been admitted is as applicable to this case and the evidence given in it and the finding of the jury to the effect that said dead body was the corpse of Hillmon*, AMOUNTS TO A HOLDING AND DECISION by this Court that such alleged *conspiracy can be established against John W Hillmon and defendant in error*, and recovery on the policy prevented, because of and by the *statements of Baldwin made in the absence of each*, and by testimony of Baldwin's supposed financial condition (including incompetent evidence to show such financial condition, that is, by permitting Crew to testify as to *his conclusions of fact* arrived at by claimed examination of writings and other things). And therefore we contend that the decision shown by the opinion in this case is erroneous and contrary to heretofore well established law.

18th. And further, irrespective of the foregoing, as the jurors by their verdict found to the effect that said dead body was the corpse of John W. Hillmon, it follows as a matter, certain beyond question, that he was not a party to any alleged conspiracy relating to said dead body, (his own), and that he did not and could not have made any alleged claim, pretence or representation or been party to any claim, pretence or representation relating thereto, either to plaintiff in error or to any person or persons, and the allegations in the 2nd defense are limited to that specific dead body as heretofore shown, so found by the triers of the facts to have been the corpse of Hillmon, and from this several matters follow, including that the jury necessarily in their verdict include a finding to the effect that there was not evidence sufficient to establish the alleged conspiracy as against Hillmon, that dead

body being his corpse, and therefore it follows that the alleged conspiracy did not exist, and also that the only issuable allegations in the 2nd defense were not only absurd but could not have been true, that dead body being as found by the jury the corpse of Hillmon, and the jury were the triers of every fact in the case pertinent or in any manner relevant to the conspiracy question, and their finding is, we contend, conclusive against plaintiff in error to the effect that there was not any such, as alleged, conspiracy.

Therefore, and because of the matters before mentioned, defendant in error claims this Court erred in its rulings and decisions in relation to the matter of the written statement dated of the 4th of September, 1879, and alleged conspiracy referred to in its opinion in this case, and therefore petitions for a rehearing of the case, and that the orders and judgments of this Court made herein at this October term, A. D. 1902, be set aside and vacated, and that the judgments of the United States Circuit Court of Appeals and of the Circuit Court of the United States for the District of Kansas complained of, be affirmed, and ask that a mandate be not issued on the said orders and judgments of this Court until final determination hereof, and if one has been issued, that the same be recalled, etc.

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Attorneys and Counsel for Respondent, Defendant in Error.

We certify that in our opinion the foregoing petition for rehearing is well founded and ought to be sustained, and a rehearing of the case granted.

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